United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2028

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NEVIN MAWHINNEY,

Plaintiff-Appellant,

- against -

ROBERT J. HENDERSON, Superintendent, PETER PREISER, Commissioner of Corrections, and NORRIS, Lieutenant,

Defendants-Appellees.

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BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff-appellant appeals from an order of the United States District Court for the Northern District of New York (Foley, J.) dated February 26, 1975, dismissing the complaint for failure to state a claim upon which relief can be granted.

In an order dated November 20, 1975, this Court dismissed the appeal for failure to file a timely notice of appeal and remanded the action to the District Court for determination on the issue of excusable neglect.

On remand, Judge Foley, in a Memorandum Decision and Order dated February 4, 1976, found that there was excusable neglect and found plaintiff's motion of appeal timely filed.

Questions Presented

1. Is appellant's request for injunctive relief moot?

2. Did the District Court properly not consider appellant's allegations about being punished for exercising his right of access to the courts?

3. Does an inmate in punitive segregation have a constitutional right to attend communal religious services?

4. Was appellant's removal to punitive segregation proper?

Facts

Appellant is presently incarcerated in the Green Haven Correctional Facility, Stormville, New York, pursuant to a judgment of conviction, entered by the Supreme Court, New York County (Rothwax, J.), after a plea of guilty, of Sodomy in the second degree. He was sentenced on July 25, 1974, as a second felony offender, to a term of from two to four years.

Appellant commenced this action in a complaint filed with the United States District Court for the Northern District of New York on February 27, 1975. Summonses were not served on the defendants. Thus, no defendant has responded to the complaint.

The Court dismissed the complaint on the grounds that confinement to segregation is constitutional, that the denial of the right to group worship while confined to segregation does not constitute a denial of constitutional rights, and that appellant's allegations of denial of due process was insufficiently developed by facts.

POINT I

APPELLANT'S REQUEST FOR INJUNCTIVE RELIEF IS MOOT

The gravamen of the complaint is that the officials of Auburn Correctional Facility allegedly deprived appellant of the right to attend group worship meetings while in segregation and denied him due process while placing him in segregation. He sought injunctive relief and damages against the officials

of Auburn and sought to have those officials prevented from denying his right to worship in the future and from denying him his right to due process.* The face of the

* For example, in the Verified Complaint (A-6) (page references are to Appellant's Appendix), Appellant stated

> "He only seeks to enjoin Auburn Correctional Officials from their application of such rules and regulations.
>
> * * *
>
> "If not restrained and enjoined by this court, the illegal and unconstitutional action of defendants as alleged above will continue causing great and irreparable harm to plaintiff."

At A-7:

> "[W]herefore, plaintiff prays that this Court adjudge and declare that the actions of defendants were and are unconstitutional and to issue an order preliminary and permanently enjoining defendant, their officers, agents and employees, etc., and all others acting in concert with them from obstructing plaintiff in his religious worship, socializing with the general population and utilizing unconstitutional disciplinary methods to deprive plaintiff of his civil rights and for such other and further relief as this Court may deem just and proper."

See also, the "Conclusions" to plaintiff's "Memorandum of Law". (A-11) where he asks for an injunction to participate in religious and educational programs.

complaint does not purport to make an issue of appellant's alleged punishment for bringing a state court action (See Point II, post), but assuming arguendo, that it does, that claim, too, is for an injunction against Auburn officials.

Appellant is now incarcerated at Green Haven Correctional Facility. Thus, his claim for injunctive relief against alleged policies and practices at Auburn is moot.

As the court explained in Preiser v. Newkirk, 422 U.S. 394 (1974), a federal court under Article III of the Constitution lacks power "to decide questions that cannot affect the rights of litigants in the case before them", quoting from North Carolina v. Rice, 404 U.S. 244, 246 (1971). The controversy must survive to the appellate stage. The case must not be one capable of repetition yet evading review. See, Roe v. Wade, 410 U.S. 113 (1973). The reoccurence of the alleged activity must be a "continuing and brooding presence" to survive a dismissal for mootness. "Speculative contingencies afford no basis for a decision on substantive issues." 422 US at . See, DeFunis v. Odegaard, 416 U.S. 312 (1974).

Here, appellant is no longer at Auburn, and any possibility of his being denied access to religious services while in segregation at Auburn is merely speculative. Similarly, his request that the court enjoin the officials of Auburn from

placing him in segregation without due process or even from not interfering with his access to the courts remain purely speculative and an injunction would have no effect on either appellant or Auburn officials.

In sum, appellant's request for injunctive relief against the alleged policies of Auburn is not extant at this stage of review, and his request for injunctive relief is moot.*

POINT II

THE DISTRICT COURT PROPERLY DID NOT CONSIDER APPELLANT'S ALLEGATIONS ABOUT BEING PUNISHED FOR EXERCISING HIS RIGHT TO ACCESS TO THE COURTS.

Defendants do not deny that an inmate has a right to access to the Courts and that an inmate may not be punished for exercising that right. But the District Court properly did not consider that claim, since a careful reading of the complaint demonstrates that plaintiff did not present the issue to the Court.

The complaint starts with allegations about segregation and religious worship (A-5, Numbers 6 & 7). His request for relief (A-6), his memorandum of law (A9, ff) and his

* Thus, there is no need as in Burgin v. Henderson, ____ F. 2d ____ Slip. Op. No. 845, P. 3831 (2d Cir. May 24, 1976), for a remand to the District Court for the development of a record.

conclusion to his memorandum (A-11) do not concern the matter and ask for no relief with respect to that particular allegation. In fact, the history of alleged court appearance he does present (A-6) appears only as explanation for how he came to be placed in segregation.

Appellant certainly has a right to bring an action against anyone who has punished him for exercising his right of access to the courts. Yet, no matter how liberally the complaint presented to the court below is construed, it did not present such a claim.

POINT III

AN INMATE IN PUNITIVE SEGREGATION HAS NO CONSTITUTIONAL RIGHT TO ATTEND COMMUNAL RELIGIOUS SERVICES.

This Court recognized in Sostre v. McGinnis, 334 F. 2d 906 (2d Cir) cert den. 379 U.S. 892 (1964) that an inmate's right to practice his religion is not absolute. In Sostre, the Court stated (344 F. 2d at 908):

> "[T]he practice of any religion... is subject to strict supervision and extensive limitations in prison. The principal problem of prison administration is the maintenance of discipline. ... No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials." (emphasis in original)

In LaReau v. MacDougal, 473 F. 2d 974 (2d Cir. 1972), this Court held that segregated prisoners may be denied attendance at communal worship services where prison officials have made a reasoned judgment "that unruly prisoners should not be given the opportunity to instigate trouble with the general inmate population." 473 F. 2d at 979.

Inmates placed in punitive segregation are by definition unruly and instigators of trouble. That Auburn inmates in punitive segregation have been denied access to communal worship, while being provided permission to confer with a chaplain, at the inmate's request, overcomes this Court's passing comment in LaReau v. MacDougall, supra, 473 F. 2d at 979-80, note 9, that all prisoners in segregation in Connecticut cannot be prevented from attending church services. In New York, an inmate is not placed in punitive segregation unless he is unruly and undisciplined.

This Court in LaReau v. MacDougall, supra, cited, with approval, to United States ex rel. Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill., 1964) where the Court held that

segregated prisoners have no right to attend church services meant for the general prison population.

The same rule has been upheld in United States ex rel. Jones v. Rundle, 453 F. 2d 147 (3rd Cir. 1971), where the Court stated that a prisoner's right to practice religion may be reasonably restricted to facilitate the maintenance of proper discipline in the prison. Thus, visits by a chaplain satisfied Constitutional standards where an inmate in a maximum security cell was not allowed to attend communal services.

In Cooper v. Pate, 382 F. 2d 518 (7th Cir. 1967), the Court recognized that where an inmate's past misconduct demonstrated a probability that he would misuse the opportunity, he could be denied the right to attend communal religious services.

In Sharp v. Sigler, 408 F. 2d 966 (8th Cir. 1969), Judge, now Justice, Blackmun stated, with respect to religious services for segregated prisoners, (407 F. 2d at 971):

> "[T]he measure and comparison of security risks as between alternative procedures are matters appropriate for resolution by the prison authorities and are not to be determined by the inmate."

In denying segregated prisoners the right to attend religious services with the general prison population, the Court found that the controlling factors were the preservation of order and the protection of the rights of others.

An individual's religious freedom is necessarily curtailed in prison, although it cannot be denied without some reasonable basis. O'Malley v. Brierley, 477 2d 875 (3rd Cir. 1973); Barnett v. Rodgers, 410 F. 2d 995 (D.C. Cir., 1969). Questions of security and discipline, however, provide that reasonable basis for curtailment of an inmate's First Amendment Rights. Neal v. Georgia, 469 F. 2d 446 (5th Cir. 1972).

Preventing an inmate in punitive segregation, who would not be there but for his threat to the security of the institution and his need for discipline is a rational basis for denying him access to communal religious services. Such a denial does not rise to the level of a Constitutional deprivation where, as appellant alleged below, it consisted of disallowance of his attendance at services on two Sundays.

POINT IV

APPELLANT'S REMOVAL TO PUNITIVE SEGREGATION WAS PROPER.

This Court has long recognized that there is no constitutional infirmity with the use of punitive segregation. Wright v. McMann, 460 F. 2d 126 (2d Cir.) cert den. 409 U.S. 886 (1972); Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971) cert. den. 404 U.S. 1049 and 405 U.S. 978 (1972).

In Wolff v. McDonnell, 418 U.S. 539 (1974) the Court indicated that its procedures were not to apply to those incidents that did not lead to loss of good time or solitary confinement. Appellant nowhere alleges that he was denied good time, and although he did below on occasion mention "solitary" confinement, on appeal he speaks essentially about punitive segregation. In fact, the New York State Department of Correctional Services does not employ "solitary" confinement. In any event, in his complaint appellant admits that he was entitled only to an adjustment committee hearing, which is used only for lesser forms of punishment. See 7 NYCRR Part 252.

Appellant's complaint alleged that he was denied written notice of the charges and the right to call witnesses. Yet it was not until United States ex rel. Larkins v. Oswald, 510 F. 2d 583 (2d Cir., January 24, 1975) that this Court held that written notice must be provided in Adjustment Committee hearings.

Then in Crooks v. Warne, 516 F. 2d 837 (2d Cir. May 22, 1975) this Court held that New York State's Adjustment Committee proceedings must provide not only written notice but also an opportunity to call witness to ensure procedural due process.

Therefore, when appellant was placed in segregation in November 1974, it was not clear that he had the rights to written notice and the opportunity to call witnesses, since Wolff apparently did not apply to lesser forms of punishment and Sostre, assuming arguendo that it applied, did not require those provisions.

In Baxter v. Palmigiano, _____ U.S. _____, 44 USLW 4487 (April 20, 1976), the Court stated that it still had not decided whether Wolff procedures should be applied to lesser punishments and reiterated that even where solitary or loss of good time is at issue, whether an inmate is permitted to call witness is left to the sound discretion of prison officials, who are not required to provide written reasons for denying such permission.

In any event, Larkins and Crooks, as statements of new procedural rules, cannot be applied retroactively, Wolff v. McDonnell, supra, 418 U.S. at 573-74, even in a suit for damages. Cox v. Cook, 420 U.S. 734, (1975).

Defendants, who have never been served and who have not waived their right to be served, deny that appellant was denied his rights to due process, his rights under the First Amendment and that he was punished for instituting a State proceeding.

Yet, even construing the complaint most favorably as possible to appellant, the District Court below properly dismissed the complaint. His claim for injunctive relief is moot. His allegations about deprivation of the right to attend religious services on two Sundays, even if true, is so tenuous as to not support a claim for damages. See Morgan v. Montanye, 516 F. 2d 1367 reh in barc denied, 521 F. 2d 693 (2d Cir. 1975) cert. den. _____ U.S. _____ (1976). His due process claim relies on non-retroactive decisions, and his claim of punishment for instituting a legal proceeding was not properly presented to the Court below.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
OF FEBRUARY 26, 1975 SHOULD
BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
June 29, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

WILLIAM RODRIGUEZ, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 28th day of June, 1976, he served the annexed upon the following named person:

WILLIAM E. HELLERSTEIN
ELLEN J. WINNER
Attorneys for Plaintiff-Appellant
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038

Attorney s in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

William Rodriguez
WILLIAM RODRIGUEZ

Sworn to before me this
28th day of June, 1976

David L. Bürd
Assistant Attorney General
of the State of New York